Neutral Citation No. - 2024:AHC:114311-DB

Court No. - 43

Case :- CRIMINAL APPEAL No. - 2410 of 2020

Appellant :- Sintu And Another
Respondent :- State of U.P.
Counsel for Appellant :- Rajeev Goswami,Sunil Kumar Shukla,Utkarsh Birla
Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Dr. Gautam Chowdhary,J.

(*Per: Hon'ble Ashwani Kumar Mishra, J.*)

1. This appeal is directed against judgment and order of conviction and sentence dated 3.3.2020, passed by Sessions Judge, Bhadohi-Gyanpur in Session Trial No.56 of 2018 (State Vs. Sintu and another), arising out of Case Crime No.302 of 2017, Police Station Gyanpur, District Bhadohi, whereby the accused appellants Sintu and Akash have been convicted and sentenced to life imprisonment alongwith fine of Rs.50,000/- each under Section 304 read with Section 34 IPC and on failure to deposit fine to undergo additional simple imprisonment for three months each.

2. Prosecution case is based upon the written report (Ex.Ka-2) made by the two brothers of the deceased, namely Mahendra and Santosh, who have alleged that their sister was a resident of Village Miyakhanpur, Police Station Gyanpur, District Bhadohi, who has been set ablaze after a fight in her-in-laws family. The father-in-law, mother-in-law and brother-in-law poured kerosene on the deceased and she has been done to death. The incident occurred on 18.10.2017, whereas the deceased died on 20.10.2017. It

is on the basis of this written report that the First Information Report has been lodged in Case Crime No.302 of 2017, under Sections 304, 326 IPC. The investigation has proceeded in the matter, whereafter the two accused have been charged and convicted by the court of sessions, as per above.

3. During the course of investigation, the Investigating Officer has recovered burnt clothes as well as remains of kerosene and oil mixed earth etc. vide Ex.Ka-7. Inquest has been conducted on 20.10.2017, which is duly exhibited as Ex.Ka-1. Postmortem has been conducted on the same day, which is duly exhibited as Ex.Ka-3. It is on the strength of documents collected during the course of investigation as well as statement of witnesses recorded that a chargesheet was submitted only against two accused persons. Father-in-law, mother-in-law and other family members were exonerated. The husband of the deceased was working in Delhi and admittedly was neither present at the place of occurrence nor has been implicated in the matter. Cognizance has been taken on the chargesheet by the concerned Magistrate, whereafter the case has been committed to the court of sessions, where charges were framed against the two accused under Section 304/34 and 326/34 IPC. The accused persons have denied their implication, whereafter the trial commenced.

4. The prosecution essentially places reliance upon the dying declaration of the deceased, recorded by the concerned Tehsildar, who has proved it during trial (PW-7). The dying declaration of the deceased reads as under:-

> "व्यान मीरा देवी पत्नी पिन्टू गौतम निवासी पूरे मियां (sic) तहसील औराई जि० भदोही की निवासनी हूँ मेरी उम्र 29 वर्ष है। मै बयान करती हूँ कि आकाश पुत्र हिन्छ लाल रिस्ते देवर लगते समय रात 6 वजे मिट्टी के तेल डालकर जलाया गया आकाश व सिन्टू व विकाश पुत्रगण हिन्छ लाल द्वारा जलाया गया है। वयान मेरे सामने किया मै होश मे हूँ। वयान सुनकर

तसदीक करती हूँ। वयान समय 9 वजे मे दिया।"

5. The prosecution in support of its case has relied upon documentary evidence in the form of FIR as Ex.Ka-4; general diary as Ex.Ka-5; written report as Ex.Ka-2; dying declaration as Ex.Ka-16; recovery memo of burnt clothes, plain and kerosene oil mixed earth as Ex.Ka-7; memo of medical officer as Ex.Ka-13; medical certificate of death as Ex.Ka-14; burn injury report as Ex.Kha-1; postmortem report as Ex.Ka-3; panchayatnama as Ex.Ka-1; final form/report as Ex.Ka-8 and site plan with Index as Ex.Ka-6.

6. In addition to above, the prosecution has produced the oral testimony of PW-1 and PW-2, who happens to be the informants of the present case. Both PW-1 and PW-2 have not supported the prosecution case and have turned hostile. PW-3 is Dr. Deen Mohammad, who has conducted the autopsy on the deceased. He has found existence of carbon in the mouth, trachea and hyoid bone etc. The cause of death, as per the Autopsy Surgeon, is shock and haemorrhage due to burn injuries. The Autopsy Surgeon has clearly stated that apart from the burn injuries there were no other injuries found on the deceased. The extent of burn has been assessed as 90%.

7. Ramesh Chandra has been produced as PW-4, who was the Head Constable and has proved the GD and other police papers. Ishwar Deo Singh has been produced as PW-5, who has proved the recovery of burnt clothes and other materials from the place of occurrence. He has also conducted investigation in the matter and has recorded the statement of witnesses under Section 161 Cr.P.C. PW-6 is Dan Bahadur, who has proved the inquest.

8. PW-7 is Sunil Kumar, who was posted as Tehsildar and has

proved the dying declaration, which has been relied upon to convict the accused appellants. In the examination-in-chief, he has stated that the deceased was 29 year old lady whose dying declaration has been recorded by him. The doctor prior to her dying declaration had certified that deceased was in a fit state of mind to make a statement. The deceased has specifically implicated the two accused persons, and that contents of the dying declaration are verified by him.

9. PW-7 has been cross-examined on behalf of accused appellants in which he has stated that information was received by him from the concerned Sub-Divisional Magistrate on phone about the incident at about 8.00 p.m. He has, however, feigned ignorance about the time when he received certificate of fitness of the deceased for making dying declaration. It is admitted that dying declaration contains no specification of the time when its recording commenced. No certificate of the doctor was obtained after recording of the dying declaration that the deceased was in a fit state to make a statement while it was recorded. The deceased was soon referred for better medical treatment to higher centre at Varanasi. PW-7, moreover, has stated that deceased was illiterate and she could not speak clearly in Hindi and her statement was in the rural language (dialect). He has clearly stated that what was told by the deceased in local rural dialect was translated in standard Hindi. The statement of the concerned Magistrate, in that regard, reads as under:-

> "मृतका देहाती थी, मृतका अनपढ़ थी, खड़ी बोली नहीं बोल रही थी, लेकिन जो देहाती भाषा में उसने बताया था वही शुद्ध हिन्दी में लिख दिया था।"

PW-7 has also admitted that various other patients were admitted in the same ward where the deceased was admitted and the family members of the deceased were seated near the

deceased when her statement was recorded. The statement, in that regard, is also reproduced hereinafter:-

> "बयान लेते समय उसके परिवार के लोग उसके बेड के पास बैठे हुये थे।"

The Magistrate has further stated that he has not recorded any satisfaction in the dying declaration that its contents were based on the statement made by the deceased or the signs expressed by her. He also admitted that he knew of the requirement to obtain certificate of the doctor about fitness of the victim prior to, and subsequent to the recording of the statement, but such certificate has not been produced. The Magistrate has also admitted that dying declaration has not been recorded by him but is rather scribed by a companion Kanoongo. This part of the statement of the Magistrate reads as under:-

> "मृत्युपूर्व बयान पर जो लिखावट है वह मेरे द्वारा नहीं लिखी गयी थी, बल्कि मेरे साथ कानून-गो थे, उन्होंने लिखा है।"

The Magistrate, however, has denied the suggestion that the deceased was not in a position to make the statement or that the statement was recorded under the pressure of police.

10. The prosecution evidence has been confronted to the accused for recording their statement under Section 313 Cr.P.C. Both the accused have stated that the deceased committed suicide, as she was not happy living with her in-laws in the village and wanted to be with her husband at Delhi. The husband of the deceased could not arrange for her stay at Delhi, due to lack of resources and it was for this reason that the deceased poured kerosene on her body and committed suicide.

11. The defence has also produced its evidence. Reliance is

placed upon the statement of the husband of deceased (DW-1), who stated that the deceased had three children and insisted upon joining him at Delhi, and since this was not possible, the deceased committed suicide.

12. Sukhraji has been produced as DW-2, who is the grandmother of the husband of the deceased. She has also supported the defence version that the deceased wanted to go to Delhi, and only because her request could not be accepted, she committed suicide.

13. The defence has also produced Dr. Pradeep Kumar Singh as DW-3, who was the Emergency Medical Officer, posted at Gyanpur where the deceased was brought in the injured state. He has stated that deceased was admitted at about 8.25 p.m. and was examined by him. He has testified that smell of kerosene was present on the patient. He has produced the original injury register, which has been certified as Ex.Kha-1. The deceased was having 80-90% burn injuries. DW-3 has clearly stated that deceased was not able to speak clearly. He has also stated that in the event any person pours kerosene on her own body and sustains 80-90% burn injuries and carbon cells have entered in her mouth, nose etc. the patient may loose her mental sanity and even faint and in such circumstances may experience difficulty in speaking and her mind may not be fully functional. The statement of doctor, in that regard, is reproduced hereinafter:-

> "मीरा देवी पूर्ण रूप से नहीं बोल पा रही थी। यदि कोई अपने ऊपर मिट्टी का तेल डालकर आत्महत्या करने की नियत से जले और 80-90 प्रतिशत तक जल जाये तो उसके मुंह में धुंआ कण, कार्बन मुंह व नाक के माध्यम से गले में ट्रैकिया तक चले जाते हैं। व्यक्ति न्यूसेंजेनिक? शाक में मरीज मूर्छित अवस्था में हो सकता है और मांसिक दशा भी खराब हो सकती है। उसे बोलने में दिक्कत आ सकती है और दिमाग पूरी तरह से काम नहीं कर सकता है। इंजरी रिपोर्ट पर मजरूबा के निशान अंगूठा एक जगह प्रमाणित है, दूसरे जगह प्रमाणित नहीं है। इंजरी रिपोर्ट पर मजरूबा

> के तीन जगह निशान अंगूठा अंकित हैं, जिसमें दो निशान अंगूठा मेरे द्वारा प्रमाणित नहीं है, एक जगह प्रमाणित है। मुझे याद नहीं कि मैने मजरूबा का शारीरिक क्षमता, मांसिक क्षमता, धड़कन, श्वास की जांच किया था या नही। ऐसा नहीं है कि 90% जले व्यक्ति की जांच न की जाती हो।"

14. The doctor has not been cross examined by the prosecution on the above aspect and no contra evidence is produced to contradict the opinion of the treating doctor.

15. On the basis of the above evidence led in the matter, the trial court has convicted and sentenced the accused appellants, primarily relying upon the dying declaration of the deceased.

16. Learned counsel for the appellants submits that none of the prosecution witnesses has otherwise supported the prosecution case and the conviction recorded only on the strength of dying declaration would be legally impermissible for the following reasons:-

(a). The dying declaration has not been recorded by PW-7, rather it has been recorded by the companion Kanoongo, who has not been produced.

(b). The deceased was illiterate and gave her statement in the rural/local dialect, which was translated by the scribe, but since the scribe has not been produced as such the defence has been prejudiced as it has not been able to question the scribe about the exact contents of her utterances.

(c). The presence of relatives nearby the deceased does not rule out the possibility of tutoring.

(d). The doctor, who gave the statement of fitness of the deceased, has deliberately been withheld by the prosecution during the trial, and when such defence has been produced by the defence as a witness, he has doubted the fitness of the

deceased to make declaration.

17. In addition to the above, learned counsel for the appellants submits that the deceased had three children and had died nearly 10 years after her marriage. There was no previous complaint of any harassment or victimization by the in-laws, and that the incident was a solitary one in which the accused persons have been falsely implicated. Learned counsel submits with vehemence that in fact deceased committed suicide, which fact is clearly supported from the postmortem report as per which the deceased sustained no other injuries. It is also alleged that the burn injuries are present in front part of her body and also on the back, which clearly supports the inference that deceased herself poured kerosene and despite the attempt by the family members, she could not be saved. It is also submitted that other family members of the deceased for such reasons were rightly not implicated and the court below has wrongly convicted and sentenced the accused appellants who were similarly placed. In support of their contention, learned counsel for the appellants place reliance upon the judgment of the Supreme Court in Panchanand Mandal alias Pachan Mandal and another Vs. State of Jharkhan, (2013) 9 SCC 800; Govind Narain and others Vs. State of Rajasthan and others, 1993 AIR (SC) 2457; Kajal Sen and others Vs. State of Assam, (2002) 2 SCC 551; Deepak Baliram Bajaj and another Vs. The State of Maharashtra, 1993 SCC OnLine Bom 151; and Mularidhar alias Gidda and another Vs. State of Karnataka, (2014) 5 SCC 730.

18. Learned AGA, on the other hand, submits that there was no enmity on part of the Tehsildar with accused persons, and therefore, his statement cannot be questioned. It is further argued that mere fact that the assisting Kanoongo who recorded the statement was not produced would make no

impact on the credibility of the dying declaration, inasmuch as the contents of the dying declaration have been fully proved by the Tehsildar (PW-7). Learned AGA further submits that the conclusion drawn by the court of sessions against the appellants relying upon the statement of PW-7 as well as the dying declaration suffers from no legal infirmity, and therefore, the appeal merits no interference.

19. We have heard Sri Rajeev Goswami and Sri Utkarsh Birla, learned counsel for the appellants and Sri Vikas Goswami, learned AGA for the State and have perused the records of appeal as also the original records.

20. Rival contention of the parties have already been noticed above. It remains undisputed that the deceased was a married lady with three children, who died on account of burn injuries sustained by her. At the time of incident, the husband of the deceased admittedly was at Delhi and was not present at the place of occurrence. No eye-witness account is available from the prosecution side to implicate the accused appellants regarding the incident.

21. We have perused the evidence on record, which clearly reveals that apart from the burn injuries, there are no other injuries found on the person of the deceased. Specific statement is made by the Autopsy Surgeon in this regard. The treating doctor (DW-3) although has proved the injury register relating to the deceased but no material could be produced to contradict the statement of the Autopsy Surgeon that in fact no other injuries were caused to the deceased, except the burn injuries. The treating doctor as well as the Autopsy Surgeon in their respective statement specified the extent of burn injuries as 80-90%.

22. It is clearly reflected from the record that though the prosecution case started on the statement of two brothers of the deceased about the deceased having been done to death by her in-laws but at the stage of trial these prosecution witnesses of fact have not supported the prosecution case. The prosecution has essentially placed reliance upon the dying declaration. Submissions advanced by learned counsel for the appellants with regard to admissibility and reliability of the dying declaration, accordingly, falls for consideration in the facts of the present case.

23. The dying declaration has been proved by the PW-7, who happens to be the recording magistrate (Tehsildar). We have carefully perused the dying declaration, and its undisputed salient features are that -

> 'It is admitted to PW-7 that he himself has not scribed the dying declaration, and that it was actually scribed by a Kanoongo, who was present with him. It is an undisputed fact that the Kanoongo, who scribed the dying declaration has been produced by the prosecution. Absolutely, no explanation is forthcoming from the prosecution side as to why the scribe of the dying declaration has not been produced in evidence.'

24. At this stage, we may refer to the two judgments relied upon on behalf of appellants in order to submit that non-production of scribe may cause prejudice to the accused, since the defence would be denied the opportunity to cross-examine him. In Panchanand Mandal (supra), the Supreme Court observed as under in para 15:-

> "15. Ext.4, the dying declaration also suffers from infirmities. **The author who recorded the dying declaration C.Paswan, ASI was**

> **not produced by the prosecution for examination or cross-examination.** The explanation given by the prosecution in this matter was that the attendance of the ASI could not be secured in spite of summons issued against him and the letters written to the Superintendent of Police, Deoghar and Giridih. The Trial Court wrongly held that this was a convincing explanation. **In fact, non-appearance of ASI has prejudicially affected the defendant's interest as they were denied the opportunity to cross-examine him.** It is admitted that dying declaration (Ext.4) was not certified by any medical expert stating that the deceased was in medically fit condition for giving statement. Though such certificate is not mandatory, it was the duty of the officer who recorded the same to mention whether the deceased was in mentally and medically fit condition for making such statement, particularly when the case was of a third degree burn which could lead to death."
>
> (Emphasis supplied by us)

In Govind Narain (supra), the observation made by the Supreme Court in Para 14 would also be relevant and are reproduced hereinafter:-

> "14. That takes us now to the consideration of the dying declaration alleged to have been reduced into writing, exhibit P-3. The High Court as well as the trial court have disbelieved exhibit P-3 for a variety of reasons. Even if we agree with Mr. Makwana, learned Counsel for the complainant that some of the reasons given by the High Court to discard exhibit P 3 were not sound, **we find that no reliance can be placed on the document exhibit P-3 for the simple reason that the scribe of the document, Shri Jagdish Narain, constable, for the reasons best known to the prosecution, was not examined at the trial and the defence therefore, had no opportunity to cross examine him.** Mohammed Ali P.W. 4 has failed to explain the cause for non production of Jagdish Narain. **We are, therefore, in agreement both with the trial court and the High Court, that there are sufficient reasons on the record to justify the discarding of the alleged dying declaration contained in exhibit P 3** and we do not place any reliance on the same."
>
> (Emphasis supplied by us)

25. The other undisputed fact relating to the dying declaration is that the exact words spoken by the deceased have not been recorded in the dying declaration. PW-7 has admitted that deceased was a rustic villager and had given her statement in the local dialect, which has been translated into standard Hindi. PW-7 has admitted that this translation work was done by the scribe, who admittedly has not been produced. In the facts of

the present case, this Court, therefore, finds that what exactly was stated by the deceased is not on record. What is on record is the translated text of the original statement by the scribe, who is not produced. There is absolutely no explanation offered by the prosecution as to why the scribe has not been produced, particularly when the version of the deceased was translated by him. In this regard, it would be relevant to notice the observations of the Supreme Court in the similar circumstances where the contents of the dying declaration had been translated. In Kajal Sen (supra), the Supreme Court observed as under in para 8:-

> "8. PW10 has stated in his evidence that dying declaration of deceased was recorded at 11.00 p.m. and deceased made the same in Bengali language, which he translated in English and explained the dying declaration by translating it in Bengali to the deceased. He has also admitted that the patient was surrounded by many attendants and they were talking with the deceased but he was not hearing the same. He also admitted that he was knowing Bengali. **He first heard the entire statement of Piklu in Bengali and keeping the same in memory, he wrote down the dying declaration in English. He admits that he has not mentioned so in the dying declaration.** It was suggested to him that dying declaration was prepared after the death of Piklu. He has also not taken a bed-head ticket in which the treatment and condition of patient are recorded. **Further, it is difficult to believe that deceased would state that this be considered as his dying declaration.** Therefore, it appears that the entire story of recording dying declaration is doubtful."
>
> (Emphasis supplied by us)

26. In addition to the above, we also find that there were large number of family members surrounding the deceased at the time when the dying declaration was allegedly made by the deceased. Presence of such family members around the victim would be a circumstance, on the strength of which it can always be alleged by the defence that the declaration was not voluntary and was actually a result of tutoring [*see*:- State of U.P. Vs. Raj Bahadur, 1992 Legal Eagle (ALD) 221; Phulel Singh Vs. State of Haryana, (2023) 10 SCC 268; and Manjunath and

others Vs. State of Karnataka, 2023 LiveLaw (SC) 961].

27. When the evidence on record relating to dying declaration is analysed in light of the applicable law, referred to above, we find that the dying declaration is not entirely reliable for the simple reason that (i) it had been written by a person, who has not been produced, (ii) no explanation is furnished for his non-production, (iii) dying declaration contains the translated version of the statement made in the local dialect, and therefore, unless the scribe is produced, it would be impossible for the defence to enquire from him as to what exact statement was given by the victim, (iv) Non-production of scribe, in the facts of the present case, has actually caused prejudice to the accused appellants. Their rights to make necessary questions from the scribe have adversely affected the defence (v) Presence of relatives near the injured at the time of recording her statement may indicate influence on the victim and possibility of tutoring in such circumstances cannot be ruled out.

28. Since the dying declaration is the sole basis for conviction and sentence of the accused appellants and we have already come to the conclusion that the dying declaration is not entirely reliable for the reasons, noticed above, we find that in the absence of any other prosecution witness supporting the prosecution case, the finding returned by the court below that the prosecution has established its case beyond reasonable doubt against the accused appellants cannot be sustained. The judgment of the trial court has been produced before us, which fails to notice the peculiarities of the dying declaration, on account of which it could be effectively argued by the defence that the dying declaration is not reliable. The accused appellants accordingly are entitled to benefit of doubt, as the dying declaration itself has not been found to be reliable.

29. In that view of the matter, the present appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 3.3.2020 is set aside. The appellants Sintu and Akash shall be set to liberty, unless they are required in any other case, subject to compliance of Section 437A Cr.P.C.

Order Date :- 18.7.2024
Anil

(Dr. Gautam Chowdhary,J.) (Ashwani Kumar Mishra,J.)